COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. 2019-P-1253

BOSTON REDEVELOPMENT AUTHORITY d/b/a BOSTON PLANNING AND DEVELOPMENT AGENCY
Plaintiff-Appellant

v.

BOSTON PRIVATE BANK AND TRUST COMPANY, et als,
Defendants-Appellees

BOSTON REDEVELOPMENT AUTHORITY APPLICATION FOR FURTHER APPELLATE REVIEW

I. REQUEST FOR FURTHER APPELLATE REVIEW

The Decision of the Appeals Court for which Further Appellate Review is requested held that when the high bidder at a foreclosure auction signed a memorandum of sale with foreclosing mortgagee Boston Private Bank ("Boston Private"), the foreclosed property was conveyed to the bank in fee simple, and Boston Private's subsequent "…violat(ions) of the power of sale and breach(es) of the duty of good faith and fair dealing" were "irrelevant". Pursuant to Massachusetts Rule of Appellate Procedure 27.1, Appellant Boston Redevelopment Authority d/b/a Boston Planning and Development Agency ("BRA")

also seeks review of the Appeals Court holding that, after a public foreclosure auction, mortgagee Boston Private Bank permissibly conveyed the "foreclosed" property to a third-party Investor-Trustee **who was not a "purchaser… at public auction"** as required by G. L. c. 183, § 21, the Statutory Power of Sale. Appeals Court Memorandum at 4.[1]

This Decision eviscerates two hundred years of judicial precedent holding that any non-judicial foreclosure conveyance which does not strictly comply with the requirements of G. L. c. 183, § 21 is void. It is clear error, and doctrinally dangerous, as clearly shown here where, as "plausibly alleged" in the dismissed BRA Second Amended Complaint, these conveyances were "to… take title to the Property… solely for the purpose of eradicating the (BRA's Affordable Housing) Covenant… (and) that Boston Private Bank's foreclosure process was unlawfully tainted by the Bank's decision to

[1] The memorandum of sale was never performed because the highest bidder repudiated the purchase, and Boston Private Bank then executed a "Massachusetts Foreclosure Deed by Corporation", deeding the mortgaged residence to itself, for $210,000.00: less than the prevailing bid of $385,000, and despite multiple bidders who made forty-three bids higher than the opening bid of Boston Private. RA I, 210; Hearing Transcript at p. 23, RA II, 82.

convey the Property to itself after the highest bidder… defaulted, rather than giving the second highest bidder an opportunity to purchase… or selling the Property at another public auction". November, 2018 Denial of Dismissal, Addendum 2, p. 4.

Both the substantial public interest in strictly-compliant non-judicial foreclosures, and the compelling public interest in affordable housing creation and preservation, are endangered by these Appeals Court holdings.[2] Review of a decision having broad implications and far-reaching consequences for both affordable housing preservation and the integrity of the foreclosure process merits Further Appellate Review by the Supreme Judicial Court.

II. STATEMENT OF PRIOR PROCEEDINGS

The BRA's original and Amended Verified Complaints against Defendants Boston Private Bank and Trust Company (the "Private Bank") and Janet Blake, Trustee of the 21 Warren Street Realty Trust (the "Trustee") allege, *inter alia*, violation of the Power of Sale in the

[2] As the Attorney General of the Commonwealth observed in the Statement of Interest of the *Amicus Curiae,* the Commonwealth has important interests in the integrity of non-judicial foreclosures in Massachusetts, and "in safeguarding publicly-subsidized, affordable housing for moderate-income residents of the Commonwealth."

foreclosure conveyance of the Property between Boston Private and the Trustee. After conducting initial discovery, BRA was granted leave to amend its complaint for a second time to include additional defendants (Mikhail Starikov and Fred Starikov, the "Investor-Purchaser"), as well as additional factual allegations and causes of action for intentional interference with a contractual relationship and civil conspiracy.

In July and August 2018, Boston Private and the Trustee each filed Motions to Dismiss. In their initial Motions to Dismiss, the Bank insisted that the BRA's rights under the Deed Rider Covenant for Affordable Housing (the "Covenant") were foreclosed as soon as the "gavel dropped" at the foreclosure auction and the Bank and Investor-Purchaser executed a Memorandum of Sale. In November, 2018, the Superior Court (Davis, J.) issued a Decision and Order denying Defendants' Motions, on the grounds that the BRA had plausibly alleged that the "… Bank conspired with [Investor-Purchaser] to take title to the property in its own name solely for the purpose of eradicating the Covenant…". Exhibit B, Decision and

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Amicus Curiae Brief of the Attorney General at pp. 5-6.

Order at 4. Consequently, the Superior Court (initially) held that "the Bank may be liable to the BRA for violating its duty of good faith and reasonable care," a violation of which "can, in turn, invalidate an otherwise lawful sale conducted pursuant to a power of sale." Exhibit B, Decision and Order at 4. This first Superior Court judge held that "accepting the allegations in the BRA's Complaint as true, […] there is at least a plausible basis for the Court to conclude that [the Bank's] foreclosure process was unlawfully tainted by the Bank's decision to convey the Property to itself after the highest bidder, Mr. Starikov, defaulted, rather than giving the second highest bidder an opportunity to purchase the Property or selling the Property at another public auction." Appendix 2, Judge Davis' Decision and Order at 4.

After service of the Amended Complaint, Defendants filed Answers, Counterclaims and Cross-claims, and then on January 2, 2019, Boston Private filed a Motion for Judgment on the Pleadings which was joined by the Trustee. In its Motion, Boston Private again argued before a second Superior Court judge that the BRA's rights under the Covenant were "foreclosed at the moment when Boston Private and Mikhail [Starikov] signed the Memorandum of Sale…".

The second judge accepted the Defendants' contentions that the high bidder's mere signing of the Memorandum of Sale conveyed the Property to the Bank and extinguished the BRA's Affordable Covenant, even though the Memorandum of Sale was repudiated by the Investor-Purchaser and the Property was thus neither conveyed pursuant to the Memorandum of Sale nor by public auction. Appendix 3, p. 9. The dismissing judge opined that the violations of the power of sale found by Judge Davis "…occurred after the execution of the Sales Agreement (and so) are simply not relevant." *Id.*, p. 12.

The BRA appealed the Dismissal to the Appeals Court, and subsequently sought Direct Appellate Review, which was denied by this Court. Upon briefing by the parties, and an *Amicus Curiae* Brief on behalf of the Attorney General, the Appeals Court in a rescript opinion declared that "…Boston Private Bank acquired the property when (Defendant) Michael Starikov executed the memorandum of sale, (and therefore) BRA's claims that the sale violated the statutory power of sale or breached the duty of good faith and fair dealing were properly dismissed." Appeals Court Memorandum at p. 4, and fn.6.

The BRA has not sought reconsideration by the Appeals Court.

III. STATEMENT OF FACTS

The deed-restricted affordable residence at 21 Warren Street, Charlestown, MA (the "Property") is a wheelchair-engineered condominium in Boston constructed with the benefit of zoning and tax advantages to make it both affordable to low- and moderate-income families and wheelchair-accessible. In 2014, Elizabeth Gastevich purchased the Property after BRA determined that she was a qualified buyer.

The Property utilized public funding and subsidies, which were secured by an affordable housing mortgage and Covenant, which contained Maximum Resale Price limitations. Title and deed restrictions limiting the pool of potential purchasers to income-qualified families for use as a residence, and limiting the profits that could be realized from the publicly-subsidized Property, were designed to preclude conveyance of the Property to investors for resale.

Ms. Gastevich financed her purchase of the Property with a mortgage from Boston Private Bank, to which the BRA Mortgage was

subordinated. When Ms. Gastevich died on November 18, 2015, her estate defaulted on Boston Private's Mortgage.

Boston Private's mortgage required that any Notice of Sale be sent to the BRA, and any foreclosure sale undertaken pursuant to the Notice of Sale was to strictly comply with the terms of the Notice. The Covenant allowed for Boston Private itself to acquire title to the Property at foreclosure auction free of the affordability and use restrictions absent any qualified bidders, but preserved the Covenant restrictions if the Property was acquired otherwise:

> Other provisions of this Covenant notwithstanding, a mortgagee may hold a mortgage or security interest in the Premises and may acquire title to the Premises by foreclosure or instrument in lieu of foreclosure; upon either such acquisition, the covenants, restrictions and options contained in this Covenant shall terminate and have no further effect; provided that any mortgage or security interest held for such Premises was originated in compliance with Sections 3, 4, 5, 6, 7, 8, 10 and 11 of this Covenant.

Covenant at ¶11 (emphasis added). Here, neither scenario occurred: the Bank itself neither acquired title to the Property by prevailing bid at a public auction nor by deed in lieu of foreclosure.

On December 6, 2017, the Bank held a public auction at the Property. In the Notice of Sale and at the public auction, it was

announced to all bidders that the residential Unit would be conveyed subject to the BRA restrictions: including the residential use restriction and the Maximum Resale Price (which was $236,516). If the Bank made any bid at all, it made the lowest bid received at the foreclosure auction, and forty-three (43) higher bids were made by other bidders. After completion of the auction, the Private Bank and Defendant Starikov entered into the Memorandum of Sale in which the Private Bank agreed to sell the Property to Starikov for $385,000, and, "…in the event that the successful bidder at the foreclosure sale shall default…, the Mortgagee reserves the right to sell the property by Foreclosure Deed to the second highest bidder". RA II, 24.

Upon the BRA's notice to Defendant Starikov that the BRA intended to enforce the Covenant's income and residence restrictions against him, the "winning bidder" (Defendant Fred Starikov, as assignee of Defendant Michael Starikov) notified the Bank that:

> he would not purchase the Affordable Unit according to the announced auction terms and the Memorandum of Sale executed by his assignor. RA I, 211.

Simultaneous with the repudiation of the purchase terms and requirements of the Memorandum of Sale, Defendant Fred Starikov

offered to buy the affordable unit for the same amount with no contingencies if the Bank would take title to the Property in its name, then deed the Property to him without stating that the conveyance was subject to the Covenant. As the BRA alleged in its Verified Complaint, the sole purpose and intent of this post-auction agreement between the highest bidder's assignee and Boston Private was to erase the protections and limitations established in the Affordability Covenant applicable to the Property. The terms of this private sale, independent of the foreclosure auction, were neither advertised nor offered to the other auction bidders, nor was there opportunity for a qualified bidder to purchase the Property at a new auction.

Some seven weeks after the failed auction, after agreeing with Fred Starikov upon the terms of a Purchase and Sale Agreement, without further public Notice, without contacting or offering the Property to the second highest bidder, and despite forty-three other, higher bids, the Bank conveyed the affordable, wheelchair-accessible residence to itself. Again, without further public notice or auction, on January 31, 2018, one week later, Boston Private sold the Property for $385,000.00 at a private sale to Trustee Janet Blake. While not the

basis for its decision, this conveyance was misunderstood by the Appeals Court as its Memorandum states, inaccurately, that Trustee "…Janet Blake (to whom Boston Private conveyed the Property) was the assignee of the assignee of the highest bidder." Appeals Court at p. 5.[3]

IV. ISSUE OF LAW RAISED BY THIS APPLICATION

The following issues of law here presented were properly raised and preserved below in the Superior Court:

Did the Appeals Court err in holding that the foreclosing mortgagee acquired title in fee simple to the mortgaged Property post-auction by signing a memorandum of sale? [4]

Did the Appeals Court err in holding that the foreclosing mortgagee's post-memorandum "…violat(ions) of the statutory power

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[3] These facts are undisputed. Hearing Statements of Private Bank counsel: Highest bidder "…defaulted under the memorandum of sale"), RA II, 82; Brief of Boston Private, p. 18: "[Defendant] Mikhail [Starikov] defaulted on the Memorandum of Sale".

[4] The Appeals Court construction of the bidder default acquisition process is nearly impossible to reconcile with the reality of property law. That is, the Appeals Court held that "Upon the execution of the memorandum of sale, ownership of the property transferred to Boston Private as the mortgagee". Memorandum at p. 4. If so, on what terms? At what price? By what writing?

of sale" and "…breach(es of) the dut(ies) of good faith and fair dealing… were properly dismissed" because "they are irrelevant"?[5]

V. THE APPEALS COURT RULINGS THAT FORECLOSING MORTGAGEES ACQUIRE FEE SIMPLE TITLE WHEN A MEMORANDUM OF SALE IS SIGNED WITH A HIGH BIDDER, AND THAT THE MORTGAGEE'S SUBSEQUENT VIOLATIONS OF THE STATUTORY POWER OF SALE ARE "IRRELEVANT" EVISCERATE "STRICT COMPLIANCE" FORECLOSURE JURISPRUDENCE.

The Appeals Court decision affirming the Trial Court Dismissal of the BRA claims, if left unreviewed, enshrines unsupported and unsound doctrines into the long-established precedent that non-judicial foreclosure conveyances are "wholly void" unless the foreclosure is conducted in strict compliance with G. L. c. 183, § 21, and with the mortgagee's duty of good faith and fair dealing.[6] *United States Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 646, (2011). Strict adherence to § 21 precludes any foreclosure conveyance except "... by public auction, …***to the purchaser or purchasers***… in fee simple…". The Appeals Court committed clear error when it disregarded the

[5] Appeals Court Memorandum at 4, 5.

[6] *James B. Nutter & Co. v. Estate of Murphy*, 478 Mass. 664, 668 (2018) ("…statutory power of sale is far more than a mere contractual shorthand; §21 establishes affirmative requirements that a mortgagee must meet in order to foreclose by power of sale…. Failure to strictly adhere to the requirements of § 21 renders a foreclosure sale void.")

requirements of the Power of Sale and ruled that Boston Private lawfully acquired title to the Property by signing a Memorandum of Sale with a high bidder who then refused to perform. A, *infra.*

The Appeals Court also erred in its holding that Boston Private's post-memorandum violations of the Statutory Power of Sale and breaches of its duties of good faith and fair dealing were properly dismissed because they were irrelevant. Each and every one of these violations arose before Boston Private deeded the Property to itself, and, consequently, before Boston Private deeded the Property to the Investor Trustee.[7] The Trial Court's effort to explain away this flaw as "addition of another unnecessary step in the transaction …", and the Appeals Court's insistence that "(r)ecording a deed which eliminated the covenant and named Boston Private as the owner did nothing more that document the then-existing legal entitlements" do not excuse deeding the Property post-auction to itself: as Boston

[7] The Investor-Purchaser's refusal to buy the Property under the terms of the Memorandum of Sale and the offer to buy the Property if Boston Private would first take title itself to wash away the Affordability covenant were simultaneous. RA I, 211. Nine days later, Boston Private deeded the Property to Boston Private for $210,000; six days after that, Boston Private deeded the Property to Janet Blake, Trustee, for $385,000.00. RA I, 123 and 129,

Private was undisputedly **not "the purchaser… by public auction"**, as required by G. L. c. 183, § 21. Indeed, this Court has expressly held that a violation of that power of sale which arose a year after the until-then-lawful deed voided the conveyance. *Smith v. Provin*, 86 Mass. 516, 518, 4 Allen 516 (1862). B, *infra*.

A. AS BOSTON PRIVATE BANK WAS NEVER A PURCHASER BY PUBLIC AUCTION, THE BANK'S CONVEYANCE OF THE PROPERTY TO ITSELF WAS VOID.

1. The Statutory Power of Sale Permits Only Conveyance of Property By Public Auction to a Prevailing Purchaser.

The requirements of G.L. c. 183, § 21 are unavoidable, as are the reasons for these requirements. This Statutory Power empowers mortgagees to take families' homes by private process, without judicial imprimatur:

> Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that "one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void."

United States Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 646 (2011);

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respectively.

accord, 146 Dundas Corp. v. Chemical Bank, 400 Mass. 588, 593 (1987) ("General Laws c. 183, § 21, requires that the sale be by public auction..."). No foreclosure conveyance other than a conveyance to a prevailing "…purchaser… by public auction" satisfies this command.

The importance of the protections against unfair or "sweetheart" foreclosure sales reflected in the Statutory Power requirements that non-judicial foreclosures can only be effected "by public auction", and foreclosed properties can only be deeded to a prevailing "purchaser" is apparent. These protections become worthless if foreclosing mortgagees may simply sign a memorandum of sale with a prevailing bidder, accomplish the repudiation of the purchase, and then "sell" the Property to itself, or, indeed, anyone, free of the public auction requirements.

2. This Court Has Already Addressed a Mortgagee's Choices Where a High Bidder Defaults on a Purchase Pursuant to a Memorandum of Sale.

Directly contrary to the Appeals Court holding in this case, this Court has already instructed mortgagees that a foreclosing entity has three options for selling a property after default by an auction high bidder: (1) declare that the next highest bidder may purchase the

property; (2) resell the property promptly; or (3) re-advertise the sale for another day. *146 Dundas Corp. v. Chemical Bank*, 400 Mass. 588, 594, (1987). The Court of Appeals for the First Circuit has made explicit that "…resell the property quickly" permits only the "reauction" of the property while the bidders are still assembled:

> Massachusetts law requires sale of foreclosure property by public auction. […] 'In mortgage foreclosure sales, if the highest bidder fails to pay, the trustee of the property may declare that the next highest bidder may purchase the property, may resell the property promptly, or may readvertise the sale for another day.' Courts have explained that efforts to 'resell the property promptly' must take place at the public auction, not through a private sale which is not advertised to the public.

States Res. Corp. v. Architectural Team, Inc., 433 F.3d 73, 82 (2005) (emphasis added). Instead, the Bank simply deeded the Property to itself - conduct precluded by G. L. c. 183, § 21 and by this Court's holding in *Dundas, supra*.

3. Nothing in Cases Addressing the Foreclosure of a Mortgagor's Right of Redemption "Salvages" Any Foreclosure Conveyance Other Than By Foreclosure Deed to a Successful Purchaser By Public Auction.

Despite the unequivocal requirements of the Statutory Power of Sale, the Appeals Court relies upon three decisions determining when a mortgagor's rights of redemption terminates, and this Court's

holding in *Bevilacqua v. Rodriguez*, 460 Mass. 762, 775 (2011); *Outpost Café, Inc. v. Fairhaven Savings Bank*, 3 Mass. App. Ct. 1 (1975); *Williams v. Resolution GGF Oy*, 417 Mass. 377 (1994); *White v. Marcarelli*, 267 Mass. 596 (1929).[8] In every single one of these cases, the property was conveyed pursuant to the foreclosure sale agreement ***to the successful bidder at the foreclosure auction, as required by G. L. c. 183, § 21***.[9] In every single one of these cases, the sole issue was whether the successful bidder "by public auction"

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[8] The other decision cited in support of the Appeals Court's remarkable holding was *Santiago v. Alba*, 77 Mass. App. Ct. 46 (2010): a decision affirming the title of a mortgagee foreclosing by entry, where the Statutory Power of Sale was indeed irrelevant.

[9] Appellees offer no rationale for their claim that a repudiated memorandum of sale affects only the BRA's property rights. It is an absurd notion that where the contracting parties refuse to perform according to an agreement, a non-contracting party suffers the only loss – here extinguishment of protected public Affordability interests. *See*, e.g., 17A Am. Jur. 2d Contracts § 711, discussing choice of remedies for Breach of Executory Contract.[9] To the contrary, it is "black letter law" that the consequences of a repudiation, rescission or annulment of an executory contract, if any, are the claims of the two contractual parties against the other arising from a wrongful repudiation:

> In rescinding a contract, and in enforcing rights growing out of such rescission, one would expect to look only to the other party to the contract. ***The nature and effect of rescission are such that they can have no consequences except as against the other party to the contract.***

Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 582 (1895).

lawfully acquired the property. Except for *Bevilacqua*, *supra*, none of these cases involved any claims that the conveyance violated the Statutory Power, and, indeed, the absence of such a claim was part of the basis for the confirmation of the sale contemplated in the memorandum. *White v. Marcarelli*, 267 Mass. 596, 598-599 (1929) ("***If a foreclosure sale is fairly conducted and there is no defect in the proceedings,*** the right of the intervener to redeem is gone when the contract of sale was made with the purchaser at the auction."). In *Bevilacqua*, of course, the foreclosure conveyance was void **because it violated the Power of Sale.** *Id.* at 772.

Lacking any authority for its holding that a memorandum of sale could convey a foreclosed property to any entity other than a successful bidder, the Appeals Court seized upon language in *Bevilacqua* where the "mortgagee" was the high bidder, and so post-auction, "owned" both the legal and equitable title; the unremarkable statement that "the mortgagee owns the legal and equitable interests in the property and the mortgage no longer exists" quoted in the Decision, and cited on nearly every page gives no support to the "title sprung effulgent" doctrine which is the sole basis for the decision.

More puzzling, the case cited by the Appeals Court in its Memorandum (and in *Bevilacqua*) explained exactly when an auction memorandum unites title:

> "When **the [mortgagee buys]** at the foreclosure sale and [gives] a deed to [himself], [the mortgagee] end[s] the equity of redemption of the mortgagor…" Once **the mortgagee has purchased** the property by foreclosure deed, '[t]he land [is] no longer mortgaged land. With relation thereto the [mortgagee] [is] no longer the mortgagee thereof holding title thereto for security, but [is] the owner thereof free from the mortgage.'"

Santiago v. Alba Mgmt., 77 Mass. App. Ct. 46, 49 (2010).

In short, no Massachusetts decisional authority gives any support for the Appeals Court holding that G. L. c. 183, § 21 permits any foreclosure conveyance except one in fee simple to the successful purchaser by public auction.

B. THE APPEALS COURT HOLDING "IRRELEVANT" BOSTON PRIVATE'S VIOLATIONS OF THE POWER OF SALE AND BREACHES OF THE DUTY OF GOOD FAITH AND FAIR DEALING IS CLEARLY ERRONEOUS.

The first Trial Court Judge held that the BRA plausibly alleged that the Covenant-stripping between Boston Private and the Investor-Purchaser Trustee voided the conveyance because it violated the

power of sale and breached Boston Private's duty of good faith and fair dealing to the BRA as a holder of a restrictive deed covenant. Appendix 2, pp. 2-3. The Appeals Court disregarded this holding…

> because the alleged violations and defects in the sale occurred *after* the memorandum of sale was executed, they are irrelevant.

Memorandum at 4.[10] This is contrary to *Smith v. Provin*, 86 Mass. 516 (1862). There, the mortgage contained a Power of Sale, and upon default the mortgagor's title was foreclosed "…by a public sale and a deed". *Id., 518-519.* However, the Power of Sale required the recording of an Affidavit "…containing a statement of compliance with the requirements of the [Power of Sale] …within one year after the sale"; the Affidavit was not recorded until three years after the sale. Even though the Power of Sale violation occurred long after the conveyance, this Court held that the post-conveyance violation voided the foreclosure. *Smith v. Provin*, 86 Mass. 516, 518-519 (1862), *cited with approval in Pinti v. Emigrant Mortgage Company, Inc*., 472 Mass. 226, 243 (2015).

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[10] "BRA's claims that the sale violated the statutory power of sale or breached the duty of good faith were properly dismissed." *Id.* at 5, n.6

The Appeals Court opinion immunizes a bank's conduct once an auction bidder signs a memorandum of sale, even where the bank violates the Power of Sale and its duty of good faith and fair dealing.

Respectfully submitted,

BOSTON REDEVELOPMENT AUTHORITY d/b/a BOSTON PLANNING AND DEVELOPMENT AGENCY

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Date: August 27, 2020

CERTIFICATION PURSUANT TO MASS.R.APP.P. RULE 16(K)

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to M.R.A.P 16 (a)(13), 16 (e)(20), and 27.1. The text in this brief is in 14-point Times New Roman proportionally-spaced font. According to the word count feature of my Microsoft Word Version 2010 Version 16.18 word processing program, the countable words in the argument section total 1,997.

/s/

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Paul R. Collier, Esq.

CERTIFICATE OF SERVICE

I, Paul R. Collier, hereby certify that I served the foregoing document on counsel of record by serving the attached to:

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APPENDIX TO APPLICATION FOR FURTHER APPELLATE REVIEW in *Boston Redevelopment Authority v. Boston Private Bank, et als,* Appeals Court Case No. 19-P-1253

Appendix 1:
Rescript and Decision of the Appeals Court in
Boston Redevelopment Authority v. Boston Private Bank, et als, Appeals Court Case No. 19-P-1253

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 19-P-1253

BOSTON REDEVELOPMENT AUTHORITY

vs.

BOSTON PRIVATE BANK AND TRUST COMPANY & others.

Pending in the Superior

Court for the County of Suffolk

Ordered, that the following entry be made on the docket:

Judgment affirmed.

Order denying motion to reconsider affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date August 6, 2020.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1253

BOSTON REDEVELOPMENT AUTHORITY

vs.

BOSTON PRIVATE BANK AND TRUST COMPANY & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Boston Redevelopment Authority doing business as Boston Planning and Development Agency (BRA) appeals from the judgment dismissing its complaint alleging violations of the power of sale, breach of the duty of good faith, unjust enrichment, affordable housing violations, civil conspiracy, violations of G. L. c. 240, §§ 6, 10, and intentional interference with contractual relations.[2] BRA's interest in the property at issue stems from a restrictive covenant which required the property to be used for affordable housing. By the express terms of a deed rider, the restrictive covenant terminated upon Boston Private Bank and Trust Company's (Boston Private) acquisition by

[1] Janet Blake, as trustee for 21 Warren Street Realty Trust, Mikhail Starikov, and Fred Starikov.

[2] BRA also appeals from the order denying its motion to reconsider.

foreclosure. Because the conduct alleged in the complaint occurred after foreclosure had been completed, the motion judge concluded that Boston Private's actions were irrelevant to BRA's interest. As such, the complaint was dismissed. On appeal, BRA contends that Boston Private's actions following the execution of the memorandum of sale voided the foreclosure and thus reanimated BRA's interest in the property. We affirm.

Discussion. "We review the allowance of a motion to dismiss de novo, accepting as true the facts alleged in the plaintiff's complaint as well as any favorable inferences that reasonably can be drawn from them. What is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief. Factual allegations must be enough to raise a right to relief above the speculative level" (quotations and citations omitted). United Oil Heat, Inc. v. M.J. Meehan Excavating, Inc., 95 Mass. App. Ct. 579, 581 (2019).

BRA was the holder of a junior encumbrance on the property at issue, namely a restrictive covenant which requires that the property be used for affordable housing.[3] By the express terms of a deed rider, however, "a mortgagee may hold a mortgage or security interest in the Premises and may acquire title to the

[3] BRA also had an option to purchase the property before auction, however it is undisputed that BRA did not exercise this option.

Premises by foreclosure . . . ; upon either such acquisition, the covenants, restrictions and options contained in the Covenant shall terminate and have no further effect" (emphasis added). Thus, upon acquisition by foreclosure, the restrictive covenant -- and consequently BRA's interest -- terminated.

"[F]oreclosure is complete at the time of the auction sale" (quotation and citation omitted). Outpost Cafe, Inc. v. Fairhaven Sav. Bank, 3 Mass. App. Ct. 1, 5 (1975). Many of the rights of the mortgagor, such as the right of redemption, terminate upon execution of the memorandum of sale. See Williams v. Resolution GGF Oy, 417 Mass. 377, 384 (1994); White v. Marcarelli, 267 Mass. 596, 599 (1929) ("the right of the intervener to redeem is gone when the contract of sale was made with the purchaser at the auction").[4] Furthermore, "[w]hen the right of redemption is foreclosed . . . the former mortgagee owns the legal and equitable interests in the property and the mortgage no longer exists." Bevilacqua v. Rodriguez, 460 Mass. 762, 775 (2011), quoting Santiago v. Alba Mgt., Inc., 77 Mass. App. Ct. 46, 50 (2010). We conclude, therefore, as did the

[4] It is also clear that these rights terminate before the property is ultimately conveyed to the purchaser. See Brown v. Wentworth, 181 Mass. 49, 52 (1902) ("the plaintiff claims a right to redeem as matter of law because the bill, although filed after the sale, was brought before the conveyances were executed to carry it out. We are of opinion that she has no such right. Unless there was some defect in the proceedings, her rights were gone when the contract was made").

motion judge, that Boston Private acquired the property when Mikhail Starikov executed the memorandum of sale. At that time, BRA's interest in the property terminated. As such, because the alleged violations and defects in the sale occurred after the memorandum of sale was executed,[5] they are irrelevant. See Williams, supra ("The execution of the memorandum of sale terminated the plaintiffs' equity of redemption. The post-foreclosure events, therefore, lacked legal significance" [citations omitted]).

BRA asserts, nevertheless, that Boston Private voided the foreclosure sale by deeding the property to itself and then selling the property to someone other than the highest bidder. BRA contends the restrictive covenant was, therefore, revived. We are not persuaded. Upon the execution of the memorandum of sale, ownership of the property transferred to Boston Private as the mortgagee. See Bevilacqua, 460 Mass. at 775. As previously discussed, the restrictive covenant terminated at that time. Recording a deed which eliminated the covenant and named Boston Private as the owner did no more than document the then-existing legal entitlements. See S & H Petroleum Corp. v. Register of Deeds for the County of Bristol, 46 Mass. App. Ct. 535, 537

[5] Although BRA has made vague allegations that there were defects in the notice of sale or auction itself, it has not pointed to any specific defects. These vague allegations are not sufficient to plausibly suggest a claim for relief.

(1999) ("The function of a registry of deeds is to record documents. It is essentially a ministerial function"). Cf. Bevilacqua, supra at 771 ("there is nothing magical in the act of recording an instrument with the registry that invests an otherwise meaningless document with legal effect"). We discern no defect in the sale of the property to Janet Blake, as she was the assignee of the assignee of the highest bidder.[6] See, e.g., Ford Motor Credit Co. v. Morgan, 404 Mass. 537, 545 (1989) ("the assignee stands in the assignor's shoes").

Finally, we see no merit in BRA's claims that the motion judge was required to transfer the motion to dismiss the amended complaint to the judge who ruled on the motion to dismiss the original complaint. Superior Court Rule 9D, on which BRA relies, deals only with motions to reconsider. The second motion to dismiss in this case was a separate motion to dismiss the amended complaint. It was not, in either style or substance, a motion to reconsider the original motion. Moreover, despite BRA's assertions that the "law of the case" doctrine prevents a second judge from hearing the second motion to dismiss, "the law of the case doctrine is permissive and not mandatory." Vittands v. Sudduth, 49 Mass. App. Ct. 401, 413

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[6] Because BRA's interest terminated upon the execution of the memorandum of sale, and because there were no defects in the sale, BRA's claims that the sale violated the statutory power of sale or breached the duty of good faith were properly dismissed.

n.19 (2000). Accordingly, there was no error in allowing a second judge to consider a motion to dismiss the amended claims.[7]

Judgment affirmed.

Order denying motion to reconsider affirmed.

By the Court (Maldonado, Wendlandt & Hand, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: August 6, 2020.

[7] Because we agree that dismissal was proper, the motion judge did not err in denying the motion to reconsider.

[8] The panelists are listed in order of seniority.

Appendix 2:
Original Decision of the Trial Court Denying Motion to Dismiss Complaint in *Boston Redevelopment Authority v. Boston Private Bank, et als, Superior Court C.A. 18-CV-01578*, referred to in Decision of Appeals Court in Appeals Court Case No. 19-P-1253

Boston Redevelopment Auth. v. Boston Private Bank & Trust Co.

Superior Court of Massachusetts, At Suffolk, Business Litigation Session

November 6, 2018, Decided; November 6, 2018, Filed

Opinion No.: 141342, Docket Number: 1884 CV 01578-BLS1

Reporter
2018 Mass. Super. LEXIS 550 *; 35 Mass. L. Rep. 360

Boston Redevelopment Authority dba Boston Planning and Development Agency v. Boston Private Bank and Trust Company et al., Trustee of 21 Warren Street Realty Trust

Subsequent History: Dismissed by, Claim dismissed by, Without prejudice *Boston Redevelopment Auth. v. Boston Private Bank & Trust Co., 2019 Mass. Super. LEXIS 314 (Mass. Super. Ct., May 1, 2019)*

Judges: **[*1]** Brian A. Davis, Associate Justice of the Superior Court.

Opinion by: Brian A. Davis

Opinion

Decision and Order Regarding Defendants' Motions to Dismiss (Docket Entry Nos. 19.0 and 20.0), and Plaintiff's Mo for Leave to File Second Amended Verified Complaint (Docket Entry No. 23.0)

This action arises out of the foreclosure of a condominium unit in Charlestown, Massachusetts (the "Property") by defendant Boston Private Bank and Trust Company ("Boston Private Bank" or the "Bank"). The pleadings allege that non-party Elizabeth Gastevich ("Ms. Gastevich") purchased the Property on February 28, 2014, and simultaneously executed a first mortgage on the Property in favor of Boston Private Bank, her mortgage lender. Because Ms. Gastevich acquired the Property under an affordable housing program administered by plaintiff Boston Redevelopment Authority d/b/a Boston Planning and Development Agency ("BRA"), the property deed issued to Ms. Gastevich included a "Deed Rider Covenant for Affordable Housing" (the "Covenant"). The Covenant gives the BRA the right and option to purchase the Property from the Property owner upon receipt of notice of any form (including notice by newspaper publication) of an impending foreclosure **[*2]** against the Property. The Covenant, however, also grants the following rights to mortgagees of the Property over and above those possessed by the BRA:

> Other provisions of this Covenant notwithstanding, a mortgagee may hold a mortgage or security interest in the Premises and may acquire title to the Premises by foreclosure or instrument in lieu of foreclosure; upon either such acquisition, the covenants, restrictions and options contained in this Covenant shall terminate and have no further effect . . . Other provision of this Covenant notwithstanding, this Covenant shall be subordinate in all respects to any mortgage or security interest . . .

Covenant, ¶11.[1]

Ms. Gastevich died on November 18, 2015, and her estate subsequently failed to make the required mortgage payments on the Property. On January 18, 2017, Boston Private Bank notified the BRA that it intended to commence foreclosure proceedings. The BRA received the foreclosure notice, but made no effort to purchase the Property so as to protect the Covenant.

A public foreclosure auction of the Property was held on December 6, 2017, at which it purportedly was announced that the Property "was being conveyed subject to the Covenant **[*3]** . . ." Complaint, ¶23. The high bidder at the public auction was non-party Mikhail Starikov ("Mr. Starikov"). Mr. Starikov and Boston Private Bank thereupon entered into a written

[1] A true copy of the Covenant is appended to the BRA's Amended Verified Complaint ("Complaint") as (Docket Entry No. 10) as *Exhibit 1*.

agreement that set forth the terms of the sale of the Property (the "Memorandum of Sale"). Mr. Starikov, however, never actually purchased the Property. Rather, he defaulted on the Memorandum of Sale, purportedly because he did not wish to acquire the Property while it remained subject to the BRA Covenant.

Following Mr. Starikov's default, Boston Private Bank did not conduct another public foreclosure auction. Instead, it deeded the Property to itself on January 18, 2018, which act, according to Boston Private Bank, terminated the Covenant. See Covenant, ¶11, *supra*. Approximately two weeks later, the Bank conveyed the Property to defendant Janet Blake ("Ms. Blake" or, collectively with the BRA, "Defendants"), Trustee of 21 Realty Trust, free and clear of the Covenant, for the same price that Mr. Mikhail, the highest bidder, had agreed to pay at the December 2017 foreclosure auction. The BRA contends that Ms. Blake works with Mr. Starikov and effectively acted as his straw in purchasing the Property.

The BRA **[*4]** commenced this action in May 2018 seeking, most importantly, an order voiding the sale of the Property to Ms. Blake and reinstating the Covenant. See, e.g., Complaint, Prayers I and II. The BRA's Complaint contains eight counts. Half of the counts (alleging violation of power of sale (Count I); breach of contract (Count II); breach of the implied covenant of good faith and fair dealing (Count III); violation of G.L.c. 244, §35B (Count IV)) are asserted only against Boston Private Bank, while the remaining half (alleging violation of G.L.c. 184, §32 (Count V); unjust enrichment (Count VI); and for declaratory judgments under G.L.c. 240, §§6, 10 (Count VII), and G.L.c. 231A, §1 (Count VIII)) are asserted against both Defendants.

The case came before the Court most recently on Boston Private Bank and Ms. Blake's motions to dismiss pursuant to Mass. R. Civ. 12(b)(6), and on the BRA's motion for leave to further amend its Complaint pursuant to Mass. R. Civ. 15(a). The gist of Defendants' motions to dismiss is that the BRA, having received prior notice of Boston Private Bank's plans to foreclose on the Property and having declined to exercise its option to purchase the Property in response, is legally precluded from "resurrect[ing] the validly-terminated **[*5]** Covenant." Memorandum in Support of Boston Private Bank's Motion to Dismiss at 1. The BRA opposes Defendants motions to dismiss, arguing, in part, that Boston Private Bank breached its power of sale and violated its common law duty to protect the Covenant in the course of any foreclosure proceeding. See Sandler v. Silk, 292 Mass. 493, 496, 198 N.E. 749 (1935) ("[A] mortgagee in executing a power of sale contained in a mortgage is bound to exercise good faith and put forth reasonable diligence . . . This duty and obligation as to good faith and reasonable care extends for the benefit and is available for the protection not only of the mortgagor but of those claiming in his right, including those holding junior encumbrances or liens. The mortgagee is a trustee for the benefit of all persons interested") (citations omitted).

By means of its motion to amend, the BRA seeks to add two additional defendants (*i.e.*, Mr. Starikov and Fred Starikov) and two additional claims (*i.e.*, civil conspiracy and intentional interference with contractual relations) to this action. Defendants oppose the BRA's motion to amend.

The Court conducted a hearing on Defendants' motions to dismiss and the BRA's motion to amend on October 3, 2018. Upon consideration of the **[*6]** written submissions of the parties and the oral arguments of counsel, Defendants' motions to dismiss will be *DENIED IN PART* and *ALLOWED IN PART*, and the BRA's motion to amend will be *ALLOWED*, for the reasons discussed below.[2]

Defendants' Motions to Dismiss

A. Violation of Power of Sale (Count I)

Plaintiff alleges that Boston Private Bank breached the power of sale under G.L.c. 183, §21 and G.L.c. 244, §14, primarily because the Bank conveyed the Property

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[2] As noted above, Defendants primarily seek dismissal of the BRA's Complaint under Mass. R. Civ. 12(b)(6). Defendants also have moved for dismissal, however, under Mass.R.Civ.P. 12(b)(7) based upon the BRA's alleged failure to join certain indispensable parties, namely, Ms. Gastevich's estate and/or her heirs. Boston Private Bank, in particular, argues that because the BRA "is seeking to purchase the Property for approximately $150,000 less than the price which the [P]roperty was sold at the foreclosure auction[,] [t]he relief that [Plaintiff] seeks necessarily affects whatever rights the Gastevich estate and/or heirs may have with respect to those surplus proceeds." Reply Memorandum in Support of Boston Private Bank Bank and Trust Company's Motion to Dismiss Complaint at 2. Defendants, however, have not cited to any authority indicating that the issues involved in this action render Ms. Gastevich estate and/or her heirs necessary parties, and the Court has found none. Accordingly, the Court declines to grant Defendants' motions to dismiss under Rule 12(b)(7) at this time.

to itself without a public auction. Defendants seek dismissal of this claim on the grounds that: (1) the BRA is not a party to the Mortgage and, thus, lacks standing to enforce the Mortgage; (2) the recorded "Affidavit of Compliance with Mortgage Notice of Default Requirements" that Boston Private Bank filed after conveying the Property to itself constitutes unrebutted, *prima facie* evidence that the Bank validly exercised its power of sale; and (3) the BRA failed to make factual allegations plausibly suggesting that the Bank violated the statutory power of sale. The Court concludes that these arguments fail for at least two reasons.

First, the BRA has standing to challenge Boston Private Bank's exercise of the power of sale because a mortgagee owes a duty of good faith **[*7]** and reasonable care not only to the mortgagor, but also to "those holding junior encumbrances or liens." *Sandler, 292 Mass. at 496*. In this case, the BRA is a junior holder of an "encumbrance." See, e.g., *Triangle Center, Inc. v. Dep't of Public Works, 386 Mass. 858, 866, 438 N.E.2d 798 (1982)* (defining "encumbrance" as "[a]ny right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee") (quoting Black's Law Dictionary 473 (5th ed. 1979)). Boston Private Bank thus owed the BRA a duty of good faith and reasonable care in executing its power of sale. *Sandler, 292 Mass. at 496*. It was, in effect, "a trustee for the benefit of all persons interested" in the Property, and it was bound to exercise its rights "conscientiously and with due regard to [the BRA's] interests." *Id. at 496-97*. If, as has been alleged, Boston Private Bank agreed or conspired with Ms. Blake and/or Mr. Starikov to take title to the Property in its own name solely for the purpose of eradicating the Covenant, then the Bank may be liable to the BRA for violating its duty of good faith and reasonable care. *Id. at 496*. A violation of the duty of good faith and reasonable care can, in turn, invalidate an otherwise lawful sale conducted pursuant to a power of sale. *Id.* ("Failure in these particulars will invalidate **[*8]** the sale even though there be literal compliance with the terms of the power.") Whether such a violation occurred in the circumstance of this case is not a question that this Court can resolve on a motion to dismiss. See *Nader v. Citron, 372 Mass. 96, 98, 360 N.E.2d 870 (1977)* (In deciding motion to dismiss under *Rule 12*, "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the [claimant's] favor, are to be taken as true").

Second, as to the argument that the recorded affidavit is *prima facie* evidence that Boston Private Bank validly exercised the power of sale, the BRA's factual allegations are sufficient to rebut this *prima facie* evidence at the motion to dismiss stage. See *id.* See also *Iannacchino v. Ford Motor Co., 451 Mass. 623, 636, 888 N.E.2d 879 (2008)* (In order to survive motion to dismiss under *Rule 12(b)(6)*, complaint must include "[f]actual allegations [sufficient] . . . to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . .") (internal quotation marks and citation omitted). Here, accepting the allegations in the BRA's Complaint as true and drawing every reasonable inference in the BRA's favor, there is at least a plausible basis for the Court to conclude that Boston **[*9]** Private Bank's foreclosure process was unlawfully tainted by the Bank's decision to convey the Property to itself after the highest bidder, Mr. Starikov, defaulted, rather than giving the second highest bidder an opportunity to purchase the Property or selling the Property at another public auction. See, e.g., *146 Dundas Corp. v. Chemical Bank, 400 Mass. 588, 594, 511 N.E.2d 520 (1987)* ("in mortgage foreclosure sales, if the highest bidder fails to pay, the trustee of the property may declare that the next highest bidder may purchase the property, may resell the property promptly, or may readvertise the sale for another day"). See also *States Res. Corp. v. Architectural Team, Inc., 433 F.3d 73, 82 (2005)* ("Generally, Massachusetts law requires sale of foreclosure property by public auction . . . Courts have explained that efforts to 'resell the property promptly' must take place at the public auction, not through a private sale which is not advertised to the public"). For these reasons, Boston Private Bank's motion to dismiss Count I must be rejected.

B. Breach of Contract (Count II) and Breach of the Implied Covenant of Good Faith and Fair Dealing (Count III)

At the motion hearing conducted on October 3, 2018, the BRA agreed to the dismissal of its claim against Boston Private Bank for breach of contract. Without a claim for **[*10]** breach of contract, the BRA's claim for breach of the implied covenant of good faith and fair dealing also must be dismissed. Massachusetts law does not recognize an independent claim for breach of the implied covenant of good faith and fair dealing separate and apart from a claim for breach of the underlying contract. See *Mill-Bern Assocs., Inc. v. Dallas Semiconductor Corp., 2002 Mass. Super. LEXIS 181, 2002 WL 1340853, at *9 (Mass.Super. June 13, 2002)* (Fabricant, J.), aff'd, *60 Mass. App. Ct. 1106, 799 N.E.2d 606 (2003)* ("The implied covenant does not give rise to a cause of action independent of the underlying

contract; rather, a claim for breach of the implied covenant is, in substance, a claim of breach of contract, albeit breach not of any express covenant, but rather of the covenant that is implied by law in all contracts, whether written or oral").[3] For this reason, Boston Private Bank's motion to dismiss Counts II and III is allowed.

C. Violation of G.L.c. 244, §35B (Count IV)

The BRA further alleges that Boston Private Bank did not take reasonable steps to avoid foreclosure of the Property and thereby violated G.L.c. 244, §35B. This claim rests on a misinterpretation of G.L.c. 244, §35B, which was enacted by the Legislature "to provide additional notice and modification protection to *homeowners* facing foreclosure." *Enfeld v. Rockland Trust Company, 87 Mass.App.Ct. 1103, 24 N.E.3d 1060, 2015 WL 522658, at * 1 (2015)* (Rule 1:28), citing St. 2012, c. 194, preamble (emphasis added). **[*11]** The BRA obviously is not a "homeowner" and, thus, lacks standing to invoke the protections afforded to such owners under Section 35B. See, e.g., School Comm. of Hudson v. Board of Educ., 448 Mass. 565, 579, 863 N.E.2d 22 (2007) ("To have standing . . . the plaintiffs' interests must come within the zone of interests arguably protected by [the statute] . . . [I]t is not enough that the plaintiff[s] be injured by some act or omission of the defendant; the defendant must additionally have violated some duty owed to the plaintiff[s]") (internal quotation marks and citation omitted). For this reason, Boston Private Bank's motion to dismiss Count IV is allowed.

D. Violation of G.L.c. 184, §32 (Count V)

The BRA alleges that both Defendants violated G.L.c. 184, §32, by failing to comply with the affordable housing restrictions set forth in the Covenant. Paragraph 2 of Section 32 provides, in part, that "affordable housing restrictions are interests in land [that] may be acquired by any governmental body or such charitable corporation or trust which has power to acquire interest in the land" and that "may be enforced by [an] injunction or other proceeding . . ." G.L.c. 184, §32, ¶2. Defendants seek to dismiss this claim on the grounds that the Covenant on the Property terminated by its own terms when Boston Private Bank, as mortgagee, "acquire[d] **[*12]** title to the Premises by foreclosure." See Covenant, ¶11. As previously noted, however, the BRA has adequately pled a claim that the Bank violated its duty of good faith and reasonable care by exercising its power of sale in a manner that was specifically designed to extinguish the Covenant on the Property. See discussion re Count I, *supra*. The Court regards Count V of the BRA's Complaint alleging a violation of G.L.c. 184, §32, as the statutory embodiment of the BRA's viable claim under Count I. For this reason, Defendants' motions to dismiss Count V must be rejected.[4]

E. Unjust Enrichment (Count VI)

Under Massachusetts law, "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." Salamon v. Terra, 394 Mass. 857, 859, 477 N.E.2d 1029 (1985) (internal quotation marks and citation omitted). The elements of a viable claim for unjust enrichment are: "(1) a benefit

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[3] To the extent the BRA argues that it can maintain a claim for breach of the implied covenant of good faith and fair dealing based on Boston Private Bank's alleged breach of its separate duty of good faith and reasonable care, the argument is without merit. The duty of good faith and reasonable care discussed in Sandler, supra, is not contractual in nature and, therefore, cannot serve as a basis for an implied covenant claim. See S.M. v. M.P., 91 Mass.App.Ct. 775, 784, 79 N.E.3d 1050 (2017) ("a party breaches the covenant of good faith and fair dealing when the party exceeds *its contractual discretion* or uses its discretionary power in a pretextual manner") (emphasis added).

[4] Ms. Blake separately argues that Count V should be dismissed because the BRA purportedly has not demonstrated that G.L.c. 184, §32, encompasses the Covenant at issue here. Memorandum of Law in Support of Janet Blake, Trustee of 21 Warrant Street Realty Trust's Motion to Dismiss at 10-11. In support of this argument, she cites language in Section 32, which provides that affordable housing restrictions are enforceable regardless of privity of contract or estate as long as they are approved by the "director of housing and community development," G.L.c. 184, §32, ¶1, and she points to the absence of any allegation or proof in the BRA's Complaint that the Covenant received such an approval. *Id.* at 11. No argument has been made in this case, however, that the Covenant is unenforceable on account of any lack of "privity of contract or estate." Thus, the BRA's failure to plead that the Covenant was duly approved is neither surprising, nor fatal to its claim under G.L.c. 184, §32. Cf. United Rentals (N. Am.), Inc. v. TGBD, LLC, 2014 Mass. Super. LEXIS 45, 2014 WL 1878818, at *1 (2014) (allowing motion to dismiss based on "key facts") (Leibensperger, J.); Shea v. Fed. Nat. Morgage Ass'n, 2013 Mass. Super. LEXIS 188, 2013 WL 7018646, at *2 (Mass.Super. July 3, 2013) (Cosgrove, J.) (noting that court considers only "allegations of material fact" on motion to dismiss).

conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention of the benefit by the defendant under circumstances which make such acceptance or retention inequitable." *Sweeney v. DeLuca, 2006 Mass. Super. LEXIS 147, 2006 WL 936688, at *8 (Mass.Super. Mar. 16, 2006)*, citing 12 Williston on Contracts §1479 (3d ed. 1957).

Defendants argue that they necessarily received no "benefit" **[*13]** as a result of Boston Private Bank's sale of the Property to Ms. Blake and, therefore, the BRA's claim for unjust enrichment cannot prevail as a matter of law. The Court disagrees. The BRA has alleged, and the Court must accept as true for present purposes, that both Boston Private Bank and Ms. Blake "[have] been unjustly enriched by acquiring title" to the Property in violation of the terms of the affordable housing Covenant. Complaint, ¶¶73 and 75. See also *Iannacchino, 451 Mass. at 636*. These allegations are at least "plausible" in the sense that Boston Private Bank may have enjoyed a higher sale price for the Property (and a commensurately lower risk of a mortgage loan deficiency) because the Property purportedly has been stripped of the Covenant, and Ms. Blake may be able to obtain a higher resale price for the Property in the future if the Property is deemed to have been stripped of the Covenant. Drawing all reasonable inferences in favor of the BRA, the Court is persuaded that the foregoing allegations are sufficient to support a viable claim for unjust enrichment. For this reason, Defendants' motions to dismiss Count VI must be rejected.

F. Declaratory Judgment under *G.L.c. 240, §§6*.10 (Count VII)

In Count VII of its Complaint, **[*14]** the BRA requests a judicial declaration under *G.L.c. 240, §6*, the statute governing actions to quiet title, to the effect that: (1) the Property remains subject to the Covenant; and (2) the BRA retains the right to purchase the Property as set forth in the Covenant. Defendants seek to dismiss Count VII, arguing that the BRA does not have standing to assert a claim to quiet title to the Property. The Court agrees. "Long-standing Massachusetts jurisprudence holds that [a] bill will lie to remove a cloud on title only if legal title and actual possession are united in plaintiff." *Barrasso v. New Century Mortg. Corp., 91 Mass.App.Ct. 42, 49 n.6, 69 N.E.3d 1010 (2017)* (internal quotation marks and citation omitted). See also *Altobelli v. Montesi, 300 Mass. 396, 398, 15 N.E.2d 463 (1938)* ("A plaintiff, in order to maintain a bill to quiet title, must show that he has a record title which is injuriously affected"). It is undisputed in this proceeding that the BRA neither holds legal title to the Property, nor has current possession of it. At best, the BRA possesses a disputed right to exercise an option to purchase the Property. The Court regards such a right, even if valid, to be too attenuated to give the BRA standing to press a claim to quiet title to the Property. See *McCartin Leisure Indus., Inc. v. Baker, 376 Mass. 62, 66, 378 N.E.2d 980 (1978)* ("While it is true that a plaintiff seeking to quiet title must possess sufficient **[*15]** legal interest in the property so as to avoid dismissal for lack of standing, a claim of rightful legal ownership satisfies these requirements"). For this reason, Defendants' motions to dismiss Count VII are allowed.

G. Declaratory Judgment under *G.L.c. 231A, §1* (Count VIII)

In Count VIII of its Complaint, the BRA seeks essentially the same judicial declaration that it requests in Count VII, except that, for purposes of this count, the BRA cites the Superior Court's general power under *G.L.c. 231A, §1*, to "make binding declarations of right, duty, status and other legal relations sought thereby . . . in any case in which an actual controversy has arisen . . ." *G.L.c. 231A, §1*. The Court agrees with the BRA that an actual controversy exists with respect to the continued existence and enforceability of the Covenant as it pertains to the Property. For this reason, Defendants' motions to dismiss Count VIII must be rejected.

BRA's Motion to Amend

The BRA has requested leave to amend its Complaint in this action a second time to add Mr. Starikov and one of his alleged accomplices, Fred Starikov, as defendants, and to assert two additional claims for civil conspiracy and intentional interference with contractual relations. Defendants argue **[*16]** that leave to amend should be denied because any amendment would be "futile."

Rule 15 of the Massachusetts Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires." *Mass.R.Civ.P. 15(a)*. The Massachusetts Supreme Judicial Court further has held that, while "[t]he decision whether to grant a motion to amend is within the discretion of the judge, . . . leave should be granted unless there are good reasons for denying the motion." *Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264, 565 N.E.2d 1180 (1991)*.

This Court sees no good reason to deny the BRA's motion to amend in the present case, particularly when the case is less than six months old and discovery only

is beginning. Whether any of the BRA's proposed additional claims eventually will prove to be futile is not a determination that this Court can make at present. Any new claims that Defendants contend are not legally viable can be addressed, at the appropriate time, by way of a further motion to dismiss or potentially a motion for summary judgment.

For the foregoing reasons, Defendants' motions to dismiss (Docket Entry Nos. 19.0 and 20.0) are *ALLOWED* as to Counts II, III, IV, and VII of the BRA's Amended Verified Complaint, and *DENIED* as to Counts I, V, VI, and VIII. The BRA's motion for leave to amend its Complaint a **[*17]** second time (Docket Entry Nos. 23.0) is *ALLOWED*.

Brian A. Davis

Associate Justice of the Superior Court

Date: November 6, 2018

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Appendix 3:
Subsequent Decision of the Trial Court Allowing Motion to Dismiss Complaint in *Boston Redevelopment Authority v. Boston Private Bank, et als, Superior Court C.A. 18-CV-01578*, referred to in Decision of Appeals Court in Appeals Court Case No. 19-P-1253

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 18-1578 BLS1

Notice sent
4/25/2019
E. S. E.
E. & C.,PC.
D. . C.
P. R. C.,III.
R. C.
F. LAW P.,LLP.
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N. K. S.
J. A. M.
B. G.,LLP.
J. B. F.
J. H. K.
K. LAW. F.
N. F.

BOSTON REDEVELOPMENT AUTHORITY d/b/a/ BOSTON PLANNING AND DEVELOPMENT AGENCY

vs.

BOSTON PRIVATE BANK AND TRUST COMPANY, JANET BLAKE, as TRUSTEE OF 21 WARREN STREET REALTY TRUST, MIKHAIL STARIKOV AND FRED STARIKOV

(sc)

MEMORANDUM OF DECISION AND ORDER ON (1) BOSTON PRIVATE BANK AND TRUST COMPANY'S AND JANET BLAKE, TRUSTEE'S MOTIONS FOR JUDGMENT ON THE PLEADINGS AND (2) BOSTON REDEVELOPMENT AUHTORITY'S MOTION TO DISMISS JANET BLAKE, TRUSTEE'S COUNTERCLAIMS

This case arises out of a dispute between the plaintiff Boston Redevelopment Authority d/b/a Boston Planning and Development Agency (BRA) and the defendant Boston Private Bank and Trust Company (Boston Private) regarding a Deed Rider Covenant for Affordable Housing (the Covenant) that was attached to the Condominium Unit Deed (the Deed) for Unit 21 of the Warren Street, Charlestown Condominiums (Unit 21 and the Warren Condominiums). The Warren Condominiums were constructed with the benefit of subsidies provided by the BRA intended to preserve the long term affordability of condominium units, including Unit 21. Elizabeth Gastevich purchased Unit 21 with a mortgage loan provided by Boston Private. Following her death, her estate defaulted on the loan and, sometime later, Boston Private foreclosed the mortgage. The other defendants in this case are Mikhail Starikov, who was the high bidder at the foreclosure auction, his son Fred Starikov, to whom his father assigned his

rights under the Memorandum of Sale agreement for Unit 21, and Janet Blake, who is trustee of the nominee Trust in which title to Unit 21 was taken (the Trustee and the Trust).

The BRA has asserted claims against some or all of the defendants for: violation of the power of sale (Count I); Breach of the Covenant of Good Faith and Fair Dealing (Count II); Violation of G.L. c. 184, § 32 (Count III); Unjust Enrichment (Count IV); G.L. c. 240, § 6 and § 10 (Count V); Declaratory Judgment (Count VI); Intentional Interference with a Contractual Relationship (Count VII) and Civil Conspiracy (Count VIII). The Trustee has brought a counterclaim against the BRA seeking to establish an equitable lien on Unit 21 for the amount of property taxes that the Trust paid and the cost of improvements that the Trust made to Unit 21, if the court awards title to Unit 21 to the BRA. The case is before the court on Boston Private and the Trustee's motions for judgment on the pleadings and the BRA's motion to dismiss the Trustee's counterclaim.

FACTS

The following facts are taken from the BRA's Second Amended Verified Complaint and are assumed to be true for the purpose of this motion.

On February 28, 2014, the developer of the Warren Condominiums conveyed Unit 21 to Elizabeth Gastevich. Unit 21 is an affordable housing unit as defined by G.L. c. 184, § 31. The Deed had the Covenant attached to it as a rider. The Covenant is eight pages in length and places a number of restrictions on the owner's use of the premises. For example, the owner(s) must occupy Unit 21 as his or her or their principal residence. Covenant, § 4. It may only be resold to a Moderate-Income Household (a defined term in the Covenant), and the resale price cannot exceed a Maximum Resale Price (also a defined term, $236,516.08 at the time at issue in this case). Covenant, §§ 2 and 3.

Of particular importance to the disputes now before the court, Section 11 of the Covenant, which is titled Rights of Mortgagees, provides as follows:

> Other provisions of this Covenant notwithstanding, a mortgagee may hold a mortgage or security interest in the Premises and may acquire title to the Premises by foreclosure or instrument in lieu of foreclosure; upon either such acquisition, the covenants, restrictions and options contained in this Covenant shall terminate and have no further effect; provided that any mortgage or security interest held for such Premises was originated in compliance with Sections 3, 4, 5, 6, 7, 8, 10, and 11 of this Covenant.
>
> Other provisions of this Covenant notwithstanding, the Covenant shall be subordinate in all respects to any mortgage or security interest in the Premises; provided that such mortgage or security interest was originated in compliance with Sections 3, 4, 5, 6, 7, 8, 10, and 11 of this Covenant.

Section 12 of the Covenant gives to the BRA the option to purchase Unit 21 upon the occurrence of certain events. Relevant to this case is the following event: "Receipt by the [BRA] of notice in any form (including notice by newspaper publication) of an impending foreclosure against the Premises." If the BRA exercises this option: "The agreed purchase price of the Premises . . . is the lesser of the Maximum Resale Price or the fair market value, but in any event not less than the remaining mortgage loan(s) balance provided that the mortgage complied with the conditions set forth in Section 11 herein at the time of the closing of the loan(s)." Covenant, § 14.

Ms. Gastevich gave Boston Private a first mortgage on Unit 21 in return for a mortgage loan in the amount of $145,992. The mortgage included a standard Power of Sale provision. Ms. Gastevich died on November 18, 2015; her Estate subsequently defaulted on the mortgage. On January 18, 2017, First Boston notified the BRA that it was commencing foreclosure proceedings. Boston Private published a Notice of Mortgagee's Sale of Real Estate with respect to Unit 21 on October 21, 28, and November 4, 2017. The Notice included a statement that:

"The Unit is conveyed subject to and with the benefit of the rights, duties, privileges and obligations contained in the Deed Rider [Covenant]."

The Complaint does not allege and the court therefore infers that the BRA, although on notice from Boston Private of the impending foreclosure, did not exercise or attempt to exercise its option to purchase Unit 21.

The public auction was held on December 6, 2017. As customary, the auctioneer announced that Unit 21 would be sold to the highest qualified bidder, and offered to the second highest bidder if the highest bidder defaulted. Eight qualified bidders bid at the auction; the highest bid was $385,000; it was submitted by Mikhail Starikov. He made the required $5,000 down payment and executed a Memorandum of Sale for Unit 21 (Sale Agreement) on that date. The Sale Agreement required that he pay the balance of the purchase price within 30 days, which was January 5, 2018.

After Mikhail Starikov executed the Sale Agreement, the BRA and the Massachusetts Department of Transportation told him that he had purchased Unit 21 subject to the Covenant and they would enforce it. Presumably, this meant that they maintained that he could only own the premises if he was part of a Moderate-Income Household and then lived in Unit 21 and could only resell it for the Maximum Resale Price, even though he had just signed a Sale Agreement under which he was obligated to pay substantially more than that for the Unit.

Mikhail Starikov assigned his rights under the Sale Agreement to his son Fred Starikov, who told Boston Private that he would not purchase Unit 21 pursuant to the Sale Agreement. Fred Starikov and Boston Private then agreed that he would default under the Sale Agreement, Boston Private would take title to Unit 21, and he would then purchase Unit 21 pursuant to a deed from Boston Private that did not have the Covenant as a rider to it. In accordance with this

agreement, on January 24, 2018, Boston Private had the following documents recorded at the Suffolk Registry of Deeds: Certificate of Entry; Post-Foreclosure Affidavit Regarding Note; Affidavit of Compliance with Mortgage Notice of Default Requirements; Judgment on Complaint to Determine Military Status; and Massachusetts Foreclosure Deed by Corporation to Boston Private. Then, on January 31, 2018, Boston Private recorded a Quitclaim Deed granting title to the Trustee for $385,000.

DISCUSSION

The Motion for Judgment on the Pleadings

Boston Private and the Trustee have moved for judgment on the pleadings under Mass. R. Civ. P. 12 (c) with respect to all of the claims that the BRA has asserted against them. Rule 12(c) functions much like a motion to dismiss in that the court must decide if the allegations of the complaint, accepted as true for the purposes of the motion, state a claim on which relief can be granted. See *Jarosz v. Palmer,* 436 Mass. 526, 529 (2002). Accordingly, in this case the court must decide if the Complaint adequately alleges an entitlement to relief with "more than labels and conclusions." *Iannacchino v. Ford Motor Co.,* 451 Mass. 623, 635-636 (2008), quoting *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1964-1965 (2007). While factual allegations need not be detailed, they "must be enough to raise a right to relief above the speculative level . . . ." *Id.* quoting *Bell Atl. Corp.*, 127 S. Ct. at 1964-1965. At the pleading stage, a complaint must set forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . . ." *Id.* at 1966.

In the present case, the issues raised by the BRA's allegations are appropriately addressed in response to the defendants' motions because the case turns on the interpretation of the Covenant and the application of principles of law that are well established by appellate case law.

The court is cognizant of the importance of maintaining affordable housing units in the City of Boston. It will take judicial notice of the well documented need for more low and middle income housing in Boston. See, *e.g.*, "City aims $26m at creating housing," *Boston Globe* (Feb. 21, 2019 at p. C 1). However, the Covenant at issue in this case, while placing restrictions on who the owner/occupants of Unit 21 can be and to whom the owner can sell the property, also is clear in providing that an owner can mortgage the property and upon foreclosure the restrictive provisions in the Covenant will terminate. In this regard, the Covenant provides: (i) "Other provisions of this Covenant notwithstanding, a mortgagee may hold a mortgage or security interest in the Premises and may acquire title to the Premises by foreclosure or instrument in lieu of foreclosure; *upon either such acquisition, the covenants, restrictions and options contained in this Covenant shall terminate and have no further effect;*" and (ii) "Other provisions of this Covenant notwithstanding, *the Covenant shall be subordinate in all respects to any mortgage* or security interest in the Premises."[1] Covenant, § 11 (emphasis supplied) These terms of the Covenant are not ambiguous. They represent a manifest policy decision on the part of the BRA that, to enable a moderate income person to purchase an affordable unit with a mortgage loan

[1] These two provisions appearing in Section 11 of the Covenant also contain the following proviso: "provided that any mortgage or security interest held for such Premises was originated in compliance with Sections 3, 4, 5, 6, 7, 8, 10, and 11 of this Covenant." This is a somewhat confusing clause, as Sections 3-8 and 10 all address who can own and occupy the Unit, to whom the owner can sell and under what terms, and how one establishes compliance with these restrictions—none reference the mortgage or the mortgagee at all. The court finds that the only reasonable interpretation for this proviso is that the mortgage must be granted by an eligible owner or in connection with a sale to an eligible owner. Neither party has suggested any interpretation for this clause to the court.

obtained from a private, institutional lender, the grantee of the mortgage will not be subject to the very restrictive provisions of the Covenant designed to insure that Unit 21 maintains its character as an affordable housing residence, if the mortgagee acquires title to the Unit through foreclosure. In other words, the mortgagee would not be limited to selling the Unit to bidders at a foreclosure auction who qualified to own the Unit under the restrictive terms of the Covenant—a prospect that might well chill the willingness of financial institutions to offer mortgage loans to low and moderate income buyers of affordable housing units.

However, the Covenant did provide a mechanism that permitted the BRA to step in and purchase Unit 21 for the Maximum Resale Price (or less), once it became aware that the Unit was in the process of being foreclosed and thereby preserve this important affordable housing asset. See Covenant, §§12 and 14. Here, it is undisputed that the BRA received notice from Boston Private that it was beginning the foreclosure process almost a year before Unit 21 was sold at public auction. The Complaint contains no allegations explaining why the BRA did not exercise its option to purchase and prevent the Covenant's affordable housing restrictions from being terminated.

Without being specific, the BRA appears to argue that in the normal foreclosure process title passes from the owner-in-default to the buyer at auction without "title" ever passing to the mortgagee, Boston Private. In consequence, the foreclosure does not trigger the provisions of paragraph 11 of the Covenant. If the BRA is making this argument, it is not consistent with the manner in which title passes at foreclosure under Massachusetts law.

> In Massachusetts, a mortgage splits the title in two parts: the legal title, which becomes the mortgagee's, and the equitable title which the mortgagor retains. . . . The purpose of the split is to give to the mortgagee an effectual security for the payment of the debt [while] leav[ing] to the mortgagor . . . the full control, disposition and ownership of the estate. The title held by the mortgagee is defeasible, and upon payment of the note by the mortgagor . . . the mortgagee's interest in the real property comes to an end. . . . [A]n

> equity of redemption is inseparably connected with a mortgage . . . and endures so long as the mortgage continues in existence: When the right of redemption is foreclosed, the mortgage has done its work and the property is no longer mortgaged land. Instead, the former mortgagee owns the legal and equitable interests in the property and the mortgage no longer exists.

Bevilaqua v. Rodriguez, 460 Mass. 762, 774-775 (2011) (internal quotations and citations omitted). In the course of a foreclosure, when is the equity of redemption foreclosed so that by any definition both legal and equitable title to the property has passed to the mortgagee through the process of foreclosure? Case law provides a consistent answer to that as well.

In *Outpost Cafe, Inc. v. Fairhaven Savings Bank*, 3 Mass. App. Ct. 1 (1975) (*Outpost Cafe*), Chief Justice Grant explained that both statutory interpretation and decades old case law make clear that title passes when "[a]n auction sale is complete, [which means] in the generally understood sense, when the auctioneer signifies his acceptance of the highest bid." *Id.* at 3, citing G.L. c. 244, §§ 18, 21 and 22 (and various other statutes for comparison purposes), and *Conway Sav. Bank v. Vinick,* 287 Mass. 448, 453 (1934). In rejecting arguments raised by the mortgagor that the sale was not complete until a deed was delivered to the buyer, C.J. Grant explained that *White v. Macarelli*, 267 Mass. 596 (1929) clearly holds that the foreclosure is completed when the successful bidder signs the contract of sale: "The intervener (a second mortgagee who sought to set aside a foreclosure sale for alleged irregularities therein) contends that he has a right to redeem after the auction sale and before the conveyance is made. If a foreclosure sale is fairly conducted and there is no defect in the proceedings, the right of the intervener to redeem is gone when the contract of sale was made with the purchaser at the auction." *Id.* at 598-599 (internal quotation marks omitted). See also *Williams v. Resolution GGF OY*, 417 Mass. 377, 384 (1994), citing *White* and *Outpost Cafe* ("The execution of the memorandum of sale terminated the plaintiff's equity of redemption."; *Vangel v. Fleet Mortg. Grp., Inc.*, 66 Mass. App. Ct. 1106,

2006 WL 1228712, at *2 (2006) (Rule 1:28) ("Pursuant to the power of sale contained in the mortgage, Fleet auctioned the property and . . . the high bidder[ ] immediately signed a memorandum of sale and provided the agreed upon deposit. At that point, the plaintiffs lost their right to redeem the property.").

In consequence, legal and equitable title vested in Boston Private when Starikov, the high bidder, executed the Sale Agreement and, at that point, "the covenants, restrictions and options contained in this Covenant . . . terminate[d] and [had] no further effect."

The BRA makes two additional arguments that can be summarily addressed. The BRA argues that because Boston Private advertised the sale of Unit 21 at auction as being subject to "the Deed Rider [Covenant]," the restrictive terms in the Covenant survived foreclosure. The Deed, of course, was subject to the Covenant as it was a rider to the Deed and ran with the land. However, the Covenant included Section 11 which unequivocally stated that the affordable housing restrictions set out in the Covenant terminated upon foreclosure. The BRA also argues that Boston Private failed strictly to follow the terms of the Power of Sale in the mortgage thereby invalidating the foreclosure. See *Bevilacqua*, 460 Mass. at 772. The Complaint does not, however, allege what the defect was. When asked at oral argument to identify a defect or fault in the sale process, up to the point Mikhail Starikov signed the Sale Agreement, the BRA responded that it was a failure to require the affordable housing restrictions in the Covenant to continue to apply to Unit 21. That is a tautology: a failure to require that the foreclosure sale yield the result that the BRA seeks to achieve in this case means that the sale was defective. That argument does not address the actual terms of the Covenant or identify a failure properly to execute on the Power of Sale.

There is one other issue that requires further consideration. This involves events that occurred after the Sale Agreement was executed. In the Complaint, the BRA avers that, after Starikov[2] executed the Sale Agreement both it and the Massachusetts Department of Transportation told Starikov that they were going "to enforce the rights and covenants associated with the statutory subsidies to the Affordable Unit." While the precise allegation is probably more legalistic than the words actually used to tell Starikov what these state authorities were going to do to him, the gist seems to be that Starikov was informed that the BRA and the Department both believed that the Covenant's restrictions still applied to Unit 21 and they were going to enforce them. For the reasons explained above, the BRA and the Department erred in believing that the restrictions survived the foreclosure. In any event, not surprisingly, the BRA's and Department's statements apparently caused Starikov to tell Boston Private that he was not going to close under the Sale Agreement. The BRA alleges that this led to the arrangement (according to the BRA—a civil conspiracy) pursuant to which: (i) Starikov defaulted on the Sale Agreement; (ii) Boston Private took title to Unit 21; (iii) then it sold Unit 21 to Starikov for the same amount that he bid at auction, but (iv) delivered a Quitclaim deed from Boston Private to the Trustee (Starikov's nominee) that did not have the Covenant as a rider. For the reasons that follow, this arrangement unnecessarily complicated the sale of Unit 21, but does not affect the outcome of this case.

First, while no party has briefed this issue, the court is highly skeptical that if a sale of Unit 21 to Starikov pursuant to the Sale Agreement, in the ordinary course of the foreclosure process, did not cause the restrictions in the Covenant to "terminate and have no further effect,"

[2] It is alleged that at some point after the auction Mikhail Starikov assigned his rights to purchase Unit 21 to his son, Fred Starikov. For purposes of this motion, it is not necessary to distinguish between them.

that outcome could be achieved by having the Unit deeded to Boston Private and then to Starikov, or his nominee, the Trust.

Addressing the BRA's specific argument, at the public auction the auctioneer announced that Unit 21 would be sold to the highest qualified bidder, and if that bidder defaulted offered to the next highest bidder: Boston Private was neither. In fact, it is not clear that Boston Private even bid (although because there has been no factual development in the case this is unknown). According to the BRA, Boston Private's acts in taking title to Unit 21 before selling it to Starikov for the price he bid, invalidates the foreclosure and causes the Covenant's restrictions to spring back.

In response, Boston Private directs the court to *146 Dundas Corp. v. Chemical Bank*, 400 Mass. 588 (1987) (*Dundas*). In that case, the mortgagor challenged the sale of the mortgaged property to the second highest bidder, even though the auctioneer had stated that the property would be sold to that bidder if the highest bidder defaulted. In its opinion, the SJC, in *dicta*, noted: "States which have considered the problem generally conclude that, in mortgage foreclosure sales, if the highest bidder fails to pay, the trustee of the property may declare that the next highest bidder may purchase the property, may resell the property promptly, or may readvertise the sale for another day." *Id.* at 594. Boston Private argues that it chose option two, and resold the property promptly. The principal holding of *Dundas*, however, appears in the next paragraph: "[The mortgagee's] duty was to protect the interests of the mortgagor . . . as well as its own interests, by ensuring that the bid on the property was fair and reasonable and represented the fair market value of the property." *Id.* at 595 (internal citation omitted). Indeed, that is the theme that runs through nearly all of the cases that address the manner in which the foreclosure auction is advertised and conducted and the transaction closed: the rights of the

mortgagor who continues to have an interest in the proceeds of the sale in excess of the mortgage debt must be reasonably protected. See *Property Acquisition Group, LLC v. Ivester*, No. 17-P-1518, slip op. at 9 (Mass. App. Ct. Apr. 18, 2019) ("The mortgagee must get for the property as much as it can reasonably be made to bring . . . [and] do what a reasonable [person] would be expected to do to accomplish that result.") (internal quotations omitted). None of these cases, actually touch on the issue presented by this case: did the BRA's act of taking title to Unit 21 in its own name after the Sale Agreement was executed and then selling it to the highest bidder at the bid price, invalidate the process such that the restrictive provisions in the Covenant never terminated or, if they did, they sprang back?[3]

In resolving that issue, it is enough to note that Boston Private acquired both legal and equitable title to Unit 21 when Starikov signed the Sale Agreement. See, *supra*, at 7-8. At that point, the restrictive provisions in the Covenant terminated according to the express terms of Section 11. If Boston Private's addition of another, unnecessary step in the transaction—recording a foreclosure deed into its own name before issuing a quitclaim deed to the Trust—caused some problem with the title, that is not an issue before the court in this case. From the perspective of the BRA, who seeks to avoid title passing to Boston Private and the consequent termination of the restrictions in the Covenant, events which occurred after the execution of the Sale Agreement are simply not relevant. See *Williams*, 417 Mass. at 383-384 (where the

[3] In fact, this case does not involve assertions that the sale was accomplished at too low a price thereby impairing the interests of the mortgagor, but rather that it was sold for too much, *i.e.*, an amount in excess of the Maximum Resale Price. The court notes, although it is not part of the allegations in the Complaint, and therefore not properly before the court, during oral argument counsel for Boston Private made clear that the proceeds of the sale to Starikov, in excess of what was due on the Gastevich note and the costs of foreclosure, have been held in escrow for the benefit of either her estate or the BRA. At the conclusion of this case, it is prepared to begin an interpleader action as it does not claim an interest in these funds.

mortgagor sought to attack the validity of a foreclosure based on events that occurred after the memorandum of sale had been executed and the SJC held that because the execution of the memorandum of sale "terminated the plaintiffs' equity of redemption . . . [t]he post-foreclosure events, therefore, lacked legal significance....").[4]

As noted above, the BRA has pled its case in eight counts. However, none of them state a claim on which relief can be granted, as the Complaint does not allege *facts* plausibly suggesting that Boston Private failed to "comply[] with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale...." For the reasons explained above, the affordable housing restrictions set out in the Covenant terminated when the BRA failed to exercise its option to purchase Unit 21 and permitted it to be sold at foreclosure. In consequence, the BRA has not pled facts supporting a plausible claim either to title in Unit 21 or to a right to enforce the affordable housing restrictions in the Covenant under any theory of law. Further, none of the allegedly tortious acts of any of the defendants caused it any injury, because they are all alleged to have occurred after the Sale Agreement was signed and the BRA's rights under the Covenant had already terminated and had no further force or effect.

[4] The BRA cites *Smith v. Provin*, 4 Allen 516 (1862) (*Smith*) for the proposition that events occurring after the execution of a memorandum of sale can empower a mortgagor to exercise an equity of redemption. However, in *Smith* the power of sale contained an express condition subsequent to the sale, i.e., the mortgagee had to record an affidavit of "his proceedings under the power" within a year of the sale. The mortgagor failed to do this and therefore the "sale must be treated as a nullity." *Smith* stands for the then already well-established tenet that the terms of the power of sale must be "very strictly" adhered to. There is nothing in *Smith* that informs the questions at issue in the instant case.

Notice sent
4/25/2019

The Motion to Dismiss the Trustee's Counterclaims (sc)

Because the court has dismissed the BRA's claims against all defendants, nothing pled in this action will cause title to Unit 21, which is in the name of Trustee, in her capacity as such, to pass to the BRA or its nominee. Therefore the Trustee's counterclaim is moot and will be dismissed.

ORDER

For the foregoing reasons, the Motions for Judgment on the Pleadings are **ALLOWED** and Final Judgment shall enter dismissing the Complaint as to all defendants.[5] Because the BRA's claims against the Trustee have been dismissed, her counterclaims for an equitable lien are moot, and therefore the Final Judgment shall also dismiss her counterclaims without prejudice.

Mitchell H. Kaplan
Justice of the Superior Court

Dated: April 22, 2019

[5] Mikhail Starikov also filed a motion to dismiss. However, as the BRA's claims to set aside the foreclosure sale and establish that the restrictive provisions in the Covenant are still in force are dismissed there is no need to address Starikov's motion to dismiss.

CERTIFICATE OF SERVICE

I, Paul R. Collier, III, hereby certify that I served the foregoing document on counsel of record by serving the attached, by electronic mail, to:

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electronically this __27th_____ day of August 2020.

_____/s/_____
Paul R. Collier, III, Esq.